

American Procedural Exeptionalism: A Deterrent or a Catalyst for Death Penalty Abolition

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AMERICAN PROCEDURAL EXCEPTIONALISM: A DETERRENT OR A CATALYST FOR DEATH PENALTY ABOLITION?

*William W. Berry III**

INTRODUCTION	481
I. CONCEPTS OF AMERICAN CULTURAL EXCEPTIONALISM	484
II. AMERICAN PROCEDURAL EXCEPTIONALISM.....	489
A. THE JURY SYSTEM	490
B. THE WRIT OF HABEAS CORPUS.....	494
C. THE SIXTH AMENDMENT RIGHT TO COUNSEL	496
III. RELATIONSHIP BETWEEN CONFIDENCE IN THE PROCESS OF RETENTION AND ADMINISTRATION OF CAPITAL PUNISHMENT IN AMERICA	499
A. THE UNITED STATES SUPREME COURT	499
1. <i>McGautha v. California</i>	500
2. <i>Furman v. Georgia</i>	501
3. <i>Gregg v. Georgia</i>	502
4. <i>Woodson v. North Carolina</i>	504
5. <i>The Post-Furman Era</i>	505
B. STATE LEGISLATURES	509
C. GOVERNORS	510
IV. AMERICAN PROCEDURAL EXCEPTIONALISM: DETERRENT OR ABOLITION OF THE DEATH PENALTY IN THE UNITED STATES?	511
CONCLUSION.....	513

INTRODUCTION

"[T]he Americans . . . are nevertheless extremely open to compassion. In no country is criminal justice administered with more mildness than in the United States. Whilst the English seem disposed carefully to retain the bloody traces of the Middle Ages in their penal legisla-

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tion, the Americans have almost expunged capital punishment from their codes.”

—Alexis de Tocqueville¹

The term “American exceptionalism,” as coined by de Tocqueville in the 1830’s, has referred historically to “the perception that the United States differs qualitatively from other developed nations, because of its unique origins, national credo, historical evolution, and distinctive political and religious institutions.”² For some, the death penalty in the United States is a morally required institution, and its current under-utilization threatens the functioning of a free and just society.³ For others, the use of the death penalty in the United States is an abhorrent continuation of government-sanctioned human rights violations inconsistent with America’s overall mission of advancing the cause of liberty and human rights throughout the world.⁴

Given that most western democracies have abolished the death penalty,⁵ to what extent are the retention and administration of the death penalty in America “exceptional,” that is, a direct result of the unique characteristics of the United States captured in de Tocqueville’s concept of “American exceptionalism?”⁶

¹ ALEXIS DE TOQUEVILLE, 2 *DEMOCRACY IN AMERICA* 203 (1862); see also STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 113 (2002) (noting the astonishment of Europeans at the various movements to abolish the death penalty in the United States in the nineteenth century).

² Harold Hongju Koh, *On American Exceptionalism*, 55 *STAN. L. REV.* 1479, 1481 n.4 (2003). Sociologists such as Louis Hartz, Werner Sombart, and Seymour Lipset further developed the modern conception of American exceptionalism, using it to explain the “strength of ‘the liberal tradition’ and the weakness of working class radicalism in the United States.” David Garland, *Capital Punishment and American Culture*, 7 *PUNISHMENT & SOC’Y* 348, 348 (2005).

³ See, e.g., Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-on Sentence*, 46 *CASE W. RES. L. REV.* 4, 4 (1995) (“Whatever purposes the death penalty is said to serve—deterrence, retribution, assuaging the pain suffered by victims’ families—these purposes are not served by the system as it now operates.”).

⁴ See, e.g., Roger Hood, *The Death Penalty: The USA in World Perspective*, 6 *J. TRANS-NAT’L L. & POL’Y* 517 (1997) (noting that given the “common commitment to liberty and human rights” among the United States and western nations, “many of us in Britain and in Europe generally are puzzled, to say the least, by the American commitment to the death penalty and to its practice of execution”).

⁵ See ROGER HOOD, *THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE* 11 (1996) (providing a world-wide abolition survey).

⁶ “Exceptional” has three general meanings: rare, superior, or differing from the norm. In this context, exceptional means differing from the “norm” of abolition in Europe by continuing to administer capital punishment. The term “American exceptionalism” here shall simply refer to the cultural, economic, political, and other characteristics of the United States that distinguish it from European states, with the caveat that the term has been used in many different contexts with a variety of meanings. See Koh, *supra* note 2, at 1482 (stating that “the term ‘American exceptionalism’ has been used far too loosely and without meaningful nuance” and describing various ways in which the term has been used).

As explained below, this Article describes the hypothesis of cultural exceptionalism and its attempt to explain the retention of the death penalty in America.⁷ The Article ultimately concludes, however, that the persistence of the death penalty in the United States is best explained not by cultural exceptionalism, but instead by procedural exceptionalism, defined as the unique American belief in its legal process. This American exceptionalism of process validates the expression of the impulse toward retribution commonly found in western nations.⁸ In other words, the perceived fairness of the process affirms the retributive notion that the execution of a murderer achieves justice for society.⁹

When the American death penalty process is shown to be unjust, arbitrary, or discriminatory in its administration, the defect in the process serves as a check on the retributive impulse. The result is a move to halt the use of the death penalty. Thus, the retention and administration of the death penalty in the United States rests upon a belief in the fairness of the American judicial process in capital punishment cases. This belief in the fairness of judicial proceedings provides justification for the expression of the retributive impulse.

Part I of this Article explores the hypothesis of American cultural exceptionalism as it relates to the death penalty. Part II defines American procedural exceptionalism and considers three procedural approaches foundational to procedural exceptionalism: the jury system, the writ of habeas corpus, and the right to counsel under the Sixth Amendment.

Part III highlights the correlation between procedural exceptionalism and the use of the death penalty in America since *Furman v. Georgia*.¹⁰ Although not exhaustive, this section attributes many of the shifts

⁷ For an interesting exploration of the use and retention of the death penalty from an empirical and international perspective, see David F. Greenberg & Valerie West, *Siting the Death Penalty Internationally*, 33 *LAW & SOC. INQUIRY* 295 (2008) (finding that the retention of the death penalty is rooted in a country's legal and political systems, and is influenced by its religious traditions).

⁸ See generally JEFFRIE G. MURPHY, *RETRIBUTION, JUSTICE, AND THERAPY* (1979).

⁹ It is not clear, however, that retribution alone is a sufficient justification for the use of capital punishment under the Eighth Amendment's prohibition against cruel and unusual punishment. See *Furman v. Georgia*, 408 U.S. 238, 344 (1972) (Marshall, J., concurring) ("It is plain that . . . punishment for the sake of retribution was not permissible under the Eighth Amendment. This is the only view . . . if the 'cruel and unusual' language were to be given any meaning. Retribution surely underlies the imposition of some punishment on one who commits a criminal act. But, the fact that *some* punishment may be imposed does not mean that any punishment is permissible. If retribution alone could serve as a justification for any particular penalty, then all penalties selected by the legislature would by definition be acceptable means for designating society's moral approbation of a particular act. The 'cruel and unusual' language would thus be read out of the Constitution . . .").

¹⁰ No executions occurred in the United States between 1967–77, in large part as a result of *Furman*. The *Furman* case held that all of the death penalty statutes in place in the United

to expand or limit the death penalty during the post-*Furman* period to the relative confidence (i.e., the belief in procedure) of the relevant institutional decisionmakers: state legislatures, governors, and most significantly, the United States Supreme Court.

Having debunked the cultural exceptionalism hypothesis and traced developments in capital punishment law and use in light of individual and institutional belief in procedure, this Article concludes by hypothesizing that procedural exceptionalism will ultimately serve as a deterrent, not a catalyst, to the abolition of the death penalty in the United States.

I. CONCEPTS OF AMERICAN CULTURAL EXCEPTIONALISM

The continued use of the death penalty over the past thirty years in the United States,¹¹ at a time when its European peers abolished it, has been understood as the by-product of different aspects of American “exceptionalism.”¹² Professor Carol Steiker identifies ten categories of American exceptionalism that are possible explanations for the divergence in death penalty policy between the United States and Europe, but she fails to subscribe to any one of them as a particularly plausible explanation.¹³ Steiker instead emphasizes that, because some of the exceptionalism theories “have less to recommend them than meets the eye,” the continued use of the death penalty in America is not a *fait accompli*.¹⁴

States at the time violated the “cruel and unusual punishment” clause of the Eighth Amendment. *Id.* at 256.

¹¹ See generally BANNER, *supra* note 1 (providing a history of capital punishment in America); HOOD, *supra* note 5 (providing a world-wide abolition survey); AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION (2001) (analyzing the culture of capital punishment in America); WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW (1993) (providing a history of capital punishment in terms of the development of international human rights norms); FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA (1986) (providing a comparative assessment of America’s movement toward abolition of capital punishment).

¹² See generally JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003); FRANKLIN E. ZIMRING, THE CONTRADICTION OF AMERICAN CAPITAL PUNISHMENT (2003); Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97 (2002).

¹³ Steiker’s list, which she admits overlaps in some cases, is as follows: (1) high homicide rates in the United States, (2) strong U.S. public opinion in favor of the death penalty, (3) the salience of crime as a political issue, (4) populism, in that American institutions are more responsive than European ones to the public will, (5) criminal justice populism, in the lay participation in the criminal justice system, (6) federalism, with each jurisdiction retaining autonomy over its use of the death penalty, (7) Southern exceptionalism, in terms of race, Protestantism, and a sub-culture of violence, and its resistance to the civil rights movement and the resulting connection to capital punishment, (8) European exceptionalism, (9) American cultural exceptionalism, in that America has a distinct sub-culture of violence (see Southern exceptionalism), and (10) the historical contingency thesis—that *Furman* abolished capital punishment but in a way that was not permanent. See Steiker, *supra* note 12, at 102–30.

¹⁴ See *id.* at 107.

Several of Steiker's categories can be combined as aspects of the broader concept of American cultural exceptionalism. The theory of cultural exceptionalism posits that the United States has a sub-culture of violence that is distinctive from Europe and other western nations. This sub-culture supposedly manifests itself in high homicide rates and explains the public desire for retribution in the form of violence toward criminal offenders and the corresponding political salience of tough crime policies.¹⁵ Under the rubric of American cultural exceptionalism, then, these allegedly distinctive cultural qualities explain the retention of the death penalty in the United States.

In his book *The Contradictions of American Capital Punishment*, Franklin E. Zimring subscribes to the concept of cultural exceptionalism.¹⁶ He identifies a historical basis for the concept of American cultural exceptionalism in the "traditions of vigilante values" concentrated in the American South during the nineteenth century.¹⁷ Zimring also recites at length the history of lynching in the American South, understanding it as a manifestation of such values.¹⁸ He then draws a correlation between those values and the continued use of the death penalty in the American South.¹⁹ Zimring therefore attributes the United States' deviation from Europe to a continuation of vigilante values inherent in American culture in the South.²⁰

Ultimately, in attempting to answer the question of why the United States, unlike its European counterparts, reintroduced the death penalty after *Furman*, Zimring concludes that (1) the use of capital punishment was re-conceptualized as a private service "that the government provides to the relatives of crime victims rather than as a manifestation of the power of the state" and that (2) the vigilante values attributable to the cultural exceptionalism of the American South take precedence over due process values.²¹

At the heart of Zimring's analysis is his central finding that "there is a tighter correlation between older geographic patterns of *lynching* and contemporary patterns of execution than between older patterns of *execu-*

¹⁵ It is no mystery that "tough on crime" policies, and in particular, willingness to use the death penalty have political resonance with the American voting constituency. See, e.g., Marshall Frady, *Death in Arkansas*, THE NEW YORKER, Feb. 22, 1993, at 105 (suggesting that the scheduling of the execution of Rickey Ray Rector during the presidential primary by the administration of Governor Clinton was no accident).

¹⁶ ZIMRING, *supra* note 12, at 14.

¹⁷ *Id.* at 90.

¹⁸ *Id.* at 89-93.

¹⁹ *Id.* at 93-98.

²⁰ *Id.*

²¹ *Id.* at 14; Paul J. Kaplan, *American Exceptionalism and Racialized Inequality in American Capital Punishment*, 31 LAW & SOC. INQUIRY 149, 150 (2006).

tion and contemporary execution.”²² He explains, “When the regional patterns of both executions and lynching of a century ago are compared with the geography of recent executions, it is the lynching pattern rather than the earlier distribution of legal executions that best approximates the extremes found in the 695 executions recorded from 1977 to 2000.”²³ For Zimring, then, the retention of the death penalty by the United States rests with the local culture of vigilantism of the communities of the American South.

James Q. Whitman, in his book *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe*, develops a parallel conception of American cultural exceptionalism. Whitman compares the historical harshness of punishment utilized in America to that in Europe.²⁴ Specifically, Whitman argues that an awareness of status emerged from the anti-aristocratic revolutions in France and Germany during the nineteenth century, the outcome of which was a heightened view of the dignity of man and a decreased propensity to seek harsh punishments for crimes.²⁵ As the “status-aware” culture evolved, prisoners began to receive the same milder punishments formerly reserved for political and upper-class prisoners.²⁶

The founding of the United States, by contrast, lacked elements of status differences, which Whitman partially attributes to the emerging Protestant notion of egalitarianism.²⁷ Accordingly, all modern prisoners were treated as lower class prisoners just as they had been treated prior to the founding of the United States, with the ultimate result being a more punitive cultural environment that continues to use the death penalty.²⁸

Whitman thus reaches the counterintuitive conclusion that the hierarchical nature of European society enabled the abolition of the death penalty while the egalitarian nature of American society deterred it. Whitman believes this process is particularly true because the European memory of harshness under the *ancien régime* results in egalitarianism in punishment (a levelling up); meanwhile, the American memory of slavery has the opposite effect of creating a hierarchy in punishment.²⁹

²² ZIMRING, *supra* note 12, at 93.

²³ *Id.*

²⁴ WHITMAN, *supra* note 12, at 13.

²⁵ *See id.* at 15.

²⁶ *See id.*

²⁷ *See id.* at 41–67.

²⁸ *See id.*

²⁹ Whitman explains:

For, on the deepest level, what must drive continental European sensibilities is the natural identification that most Europeans are able to feel with their low status ancestors. *We were all*, most of them say, *once at the bottom*. It is precisely the nature of American slaveholding that we Americans were not all once at the bottom; most Americans do not by any means identify with African slaves.

Like Zimring and Whitman, Tony Poveda draws a connection between the retention of the death penalty and American cultural exceptionalism.³⁰ Poveda focuses more broadly on the marginalization of individuals based on class and race. He views the death penalty as a tool by which the majority achieves race and class oppression as such targeted individuals constitute an “executable class.”³¹ Broadly speaking, Poveda thus advances a Mertonian “strain” theory view of cultural exceptionalism in which the cultural exclusion of certain targeted individuals results in violent acts and corresponding devaluations that provide them with a sentence of death.³²

American cultural exceptionalism, however, to the extent that one assumes it exists, fails to explain adequately the persistence of the death penalty in the United States. As argued by David Garland in his critique of both Zimring and Whitman, American cultural exceptionalism fails to account for the progression of death penalty jurisprudence in the United States during the twentieth century, including the ten year period of virtual abolition (1967–77).³³ Garland correctly points out that a historically embedded cultural trait, here the sub-culture of propensity towards violence, cannot explain the historical reality of death penalty practice in America prior to 1977.³⁴

For Garland, the decision to resume the use of the death penalty in the United States after *Furman* resulted from a combination of random factors, and not from the cultural exceptionalism as described by Zimring and Whitman.³⁵ Garland argues that the period from 1977 to 2003 merely constitutes a delay in the trajectory towards abolition of the death penalty, making the United States a mere chronological outlier, but nonetheless ultimately in step with its European counterparts.³⁶ He attributes the delay in abolition, in part, to the restraints resulting from the system of federalism in the United States.³⁷

Id. at 198.

³⁰ Tony G. Poveda, *American Exceptionalism and the Death Penalty*, 27 Soc. JUST. 252, 254 (2000).

³¹ *See id.* at 254–58.

³² *See id.* Strain theory, or “anomie,” refers to a discontinuity between cultural goals and the legitimate means available to reach them. Merton applies this concept to the United States where he saw a cultural emphasis on achieving monetary success, the “American Dream,” without corresponding focus on creating legitimate avenues needed to achieve that goal. *See* ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 125–49 (1949).

³³ David Garland, *Capital Punishment and American Culture*, 7 PUNISHMENT & Soc’y, 347–76 (2005).

³⁴ *Id.* at 348.

³⁵ *See* Kaplan, *supra* note 21, at 150.

³⁶ *See* Garland, *supra* note 2, at 356.

³⁷ *Id.* at 357–61. Garland does not attempt to explain fully the phenomenon of death penalty retention in America (understood as a temporal delay in the movement toward aboli-

In addition to Garland's temporal critique, there is significant evidence that the cultural exceptionalism cited by Zimring and Whitman is not exceptional to the United States at all. As a historical matter, the United States, not countries of the European Union, were in the vanguard of the death penalty abolition movement as early as the mid-nineteenth century.³⁸ Also, Zimring, among others, has emphasized that public opinion polls in the United States concerning the death penalty are broadly comparable to those reported elsewhere, even in nations that have long been abolitionist.³⁹

Despite their inability to explain adequately the disparity between the United States and Europe over the last thirty years, the cultural exceptionalism theories do pinpoint one key element that underlies death penalty persistence—the societal impulse towards retribution.⁴⁰ As described by Justice Potter Stewart, “[t]he instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.”⁴¹ Garland and others argue that there is no convincing evidence that the retributive impulse is unique to the United States.⁴²

In fact, without such an impulse, it would be unlikely that the death penalty would exist at all.⁴³ Unchecked, the retributive impulse equates justice with the execution of a criminal offender.⁴⁴ When checked by

tion). His critique focuses on debunking what he believes to be false assumptions concerning American culture and its relationship to the death penalty. *Id.*

³⁸ See BANNER, *supra* note 1. In the 1850s, Michigan became the first state to abolish the death penalty for all crimes except treason. See Hood, *supra* note 4, at 518. Wisconsin and Rhode Island followed suit, abolishing the death penalty for all crimes. *Id.*

³⁹ See Garland, *supra* note 2, at 361.

⁴⁰ Retributive justice can take one of two forms, either of which applies in this context. In its traditional meaning, retributive justice stands for the proposition that the amount of punishment must be proportional to the amount of harm caused by an offense. Michael Davis advocates the modern meaning, which understands retributive justice to be the amount of punishment proportional to the amount of unfair advantage gained by the wrongdoer. MICHAEL DAVIS, *TO MAKE THE PUNISHMENT FIT THE CRIME: ESSAYS IN THE THEORY OF CRIMINAL JUSTICE* 9–10 (1992); see also ROBERT M. BAIRD & STUART E. ROSENBAUM, *PUNISHMENT AND THE DEATH PENALTY: THE CURRENT DEBATE* (1995) (stating that for a defendant who takes the life of another, the death penalty is the proportional punishment under either retributive approach).

⁴¹ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (citing *Furman v. Georgia*, 408 U.S. 238, 308 (1972)).

⁴² See generally Garland, *supra* note 2. The historical use of the death penalty throughout the world confirms this notion. See, e.g., Hood, *supra* note 4.

⁴³ See, e.g., *Gregg*, 428 U.S. at 184 (“Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.”).

⁴⁴ See, e.g., HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 35–61 (1968) (discussing generally the interests served by punishment).

significant reflection or events that threaten the concept of justice underlying the retributive impulse, the use of the death penalty is reduced and ultimately may cease. Thus, the use of the death penalty can be sociologically understood as an expression of a retributive impulse of society.

II. AMERICAN PROCEDURAL EXCEPTIONALISM

In the debate concerning American exceptionalism, the influence of the American belief in the process and procedure (herein referred to as “American procedural exceptionalism”) of the legal system in the retention and administration of the death penalty has been largely ignored. One theory is that the existence of federalism has served to impede the abolition of the death penalty because Congress, unlike Parliament or a monarch, cannot make a unilateral pronouncement that it is illegal.⁴⁵

The contention of this Article, instead, is that the American confidence in the criminal justice process and its distinctive elements facilitate the retributive impulse and thus the use of the death penalty. This is most clearly seen in public opinion polls in the United States over the last three decades concerning the death penalty and concurrent moves toward or away from abolition.⁴⁶ They correspond directly with the confidence that Americans have in their legal process.

Three elements in particular—the jury system, the writ of habeas corpus, and the Sixth Amendment right to counsel—contribute to the American sense that the administration of the death penalty is an acceptable punishment for certain heinous crimes.⁴⁷ It is the combination of these elements, coupled with their corresponding cultural and sociological understanding by participants in the criminal justice system and the

⁴⁵ See Steiker, *supra* note 12, at 121.

⁴⁶ Public opinion in the United States has almost always been in favor of the death penalty, but has varied widely since the 1970's. Gallup.com, *Death Penalty*, <http://www.gallup.com/poll/1606/Death-Penalty.aspx> (last visited Nov. 14, 2007) (providing a comparison of death penalty polls taken in the United States since 1936); see also AMNESTY INT'L, UNITED STATES OF AMERICA: FAILING THE FUTURE: DEATH PENALTY DEVELOPMENTS, MARCH 1998 – MARCH 2000, at 47 (2000). See generally Phoebe C. Ellsworth & Samuel R. Gross, *Harden- ing of the Attitudes: Americans' Views on the Death Penalty*, in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 90 (Hugo Adam Bedau ed., 1997) (discussing polls of Americans regarding their attitude toward the death penalty); Death Penalty Information Center, *News and Developments — Public Opinion*, <http://www.deathpenaltyinfo.org/newsanddev.php?scid=23> (last visited Nov. 14, 2007). In 1971, the year before *Furman*, 49% of those polled were in favor of the death penalty. Gallup.com, *supra*. In 1976, that number increased to 66%. *Id.* From 1988–94, the percentage in favor of the death penalty remained around 80%. *Id.* In 2003, it dropped to around 64%, and it currently remains close to that. *Id.*

⁴⁷ The inherent trust in the judiciary prevalent in the United States dates back to Alexander Hamilton, who famously wrote, “[T]he judiciary, from the nature of its functions, will always be the least dangerous [branch of government] to the political rights of the Constitution” THE FEDERALIST NO. 78, at 425 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classics 2003).

surrounding communities, that results in American procedural exceptionalism.

In practice, then, the belief of Americans in the strength of their criminal justice process serves to facilitate, subconsciously, the impulse toward retribution. Serving as a permissive vehicle for expression of this desire for retribution or "justice," the elements of the criminal justice process justify the use of the death penalty.

Simply put, the common understanding that an individual will have had his day in court, represented by an attorney, with his case unanimously decided by twelve members of the local community, and the opportunity to appeal his case many times over several years, creates a strong public presumption that his execution is just and deserved. The belief in process and largely the process, itself, constitute procedural exceptionalism.

Unlike the cultural exceptionalism posited by Zimring, Whitman, and others, the concept of procedural exceptionalism is not a static one. When the belief in the process (procedural exceptionalism) diminishes, the expression of the retributive impulse and the corresponding demand for use of the death penalty likewise wanes. As discussed at length below, this becomes particularly important when capital punishment decisionmakers—such as the United States Supreme Court, the state legislatures, governors, and juries—increase or decrease their belief in the efficacy of the criminal justice process.

After exploring the waxing and waning of procedural exceptionalism in the United States in the post-*Furman* era, the ultimate question is whether procedural exceptionalism will serve as a catalyst or a deterrent to the abolition of the death penalty in the United States. Before reaching that question, however, it is instructive to understand the institutions and procedures that give rise to procedural exceptionalism, beginning with the jury.

A. THE JURY SYSTEM

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"

—Sixth Amendment⁴⁸

⁴⁸ U.S. CONST. amend VI.

“I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”

—Thomas Jefferson⁴⁹

In the United States criminal justice system, the Sixth Amendment affords defendants the fundamental right to trial by jury.⁵⁰ Generally consisting of twelve jurors and typically requiring a unanimous verdict, the criminal jury decides the guilt or innocence of a defendant at trial.⁵¹ In order to find a defendant guilty, a jury must find guilt beyond a reasonable doubt⁵² as to every element of the crime charged.⁵³ The jury, therefore, serves two important sociological purposes: (1) to serve as a check against arbitrary use of power by the state against its citizens⁵⁴ and (2) to provide community participation and thus a measure of credibility to the process of determining the facts of a particular case and ultimately determining guilt or innocence.

⁴⁹ Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 7 THE WRITINGS OF THOMAS JEFFERSON, MEMORIAL EDITION 408 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

⁵⁰ U.S. CONST. amend. VI. The use of the jury trial to determine criminal punishments dates to the Magna Carta in 1215; historically, the concept of trial by jury rested at the heart of the English understanding of the common law:

Those who emigrated to this country from England brought with them this great privilege “as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.”

Thompson v. Utah, 170 U.S. 343, 349–50 (1898) (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 652–53 (1833)).

⁵¹ See *Thompson*, 170 U.S. 343.

⁵² See *In re Winship*, 397 U.S. 358, 364 (1970).

⁵³ *United States v. Gaudin*, 515 U.S. 506 (1995).

⁵⁴ As the Supreme Court explained in *Duncan v. Louisiana*:

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . [T]he jury trial provisions . . . reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

391 U.S. 145, 155–56 (1968).

While in capital cases in the United States there is no requirement that a jury, not a judge, impose the death penalty,⁵⁵ the jury must make the factual findings upon which a death sentence rests.⁵⁶ Further, in many jurisdictions, the jury must recommend that the defendant be sentenced to death for the defendant to receive the death penalty.⁵⁷ There is no doubt, then, that the jury plays a crucial role in the determination of whether a defendant receives a death sentence.

Consistent with the historical fervor for the right to trial by jury, Americans still strongly favor the use of the jury system.⁵⁸ A recent American Bar Association poll reaffirmed that most Americans have faith in the jury system.⁵⁹ Eighty-four percent of respondents agreed that jury duty is an important civic duty that should be fulfilled even when inconvenient, and seventy-five percent of respondents indicated that they would want a jury, not a judge, to decide their cases if they, themselves were on trial.⁶⁰ Another poll sponsored by the American Bar Associa-

⁵⁵ *Spaziano v. Florida*, 468 U.S. 447, 457–67 (1984).

⁵⁶ *Ring v. Arizona*, 536 U.S. 584 (2002).

⁵⁷ See, e.g., *id.* at 608 n.6 (“Of the 38 States with capital punishment, 29 generally commit sentencing decisions to juries. See Ark. Code Ann. §5-4-602 (1993); Cal. Penal Code Ann. §190.3 (West 1999); Conn. Gen. Stat. §53a-46a (2001); Ga. Code Ann. §17-10-31.1 (Supp. 1996); Ill. Comp. Stat. Ann., ch. 720, §5/9-1(d) (West 1993); Kan. Stat. Ann. §21-4624(b) (1995); Ky. Rev. Stat. Ann. §532.025(1)(b) (1993); La. Code Crim. Proc. Ann., Art. §905.1 (West 1997); Md. Ann. Code, Art. 27, §413(b) (1996); Miss. Code Ann. §99-19-101 (1973-2000); Mo. Rev. Stat. §§565.030, 565.032 (1999 and Supp. 2002); Nev. Rev. Stat. Ann. §175.552 (Michie 2001); N. H. Rev. Stat. Ann. §630:5 (II) (1996); N. J. Stat. Ann. §2C:11-3(c) (Supp. 2001); N. M. Stat. Ann. §31-20A-1 (2000); N. Y. Crim. Proc. Law §400.27 (McKinney Supp. 2001-2002); N. C. Gen. Stat. §15A-2000 (1999); Ohio Rev. Code Ann. §2929.03 (West 1997); Okla. Stat., Tit. 21, §701.10(A) (Supp. 2001); Ore. Rev. Stat. Ann. §163.150 (1997); 42 Pa. Cons. Stat. §9711 (Supp. 2001); S. C. Code Ann. §16-3-20(B) (1985); S. D. Codified Laws §23A-27A-2 (1998); Tenn. Code Ann. §39-13-204 (Supp. 2000); Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon Supp. 2001); Utah Code Ann. §76-3-207 (Supp. 2001); Va. Code Ann. §19.2-264.3 (2000); Wash. Rev. Code §10.95.050 (1990); Wyo. Stat. Ann. §6-2-102 (2001). Other than Arizona, only four States commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges. See Colo. Rev. Stat. §16-11-103 (2001) (three-judge panel); Idaho Code §19-2515 (Supp. 2001); Mont. Code Ann. §46-18-301 (1997); Neb. Rev. Stat. §29-2520 (1995). Four States have hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations. See Ala. Code §§13A-5-46, 13A-5-47 (1994); Del. Code Ann., Tit. 11, §4209 (1995); Fla. Stat. Ann. §921.141 (West 2001); Ind. Code Ann. §35-50-2-9 (Supp. 2001).”)

⁵⁸ See, e.g., AMERICAN BAR ASSOCIATION, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 6–7 (1999), <http://www.abanet.org/media/perception/perceptions.pdf> (indicating that a supermajority of Americans view the jury system as the fairest method of determining guilt or innocence).

⁵⁹ See AMERICAN BAR ASSOCIATION, JURY SERVICE: IS FULFILLING YOUR CIVIC DUTY A TRIAL? (2004), <http://www.abanet.org/media/releases/juryreport.pdf> (reporting the results of a poll conducted in July 2004 that showed most Americans have a positive attitude toward jury duty).

⁶⁰ *Id.* at 5.

tion clearly linked American confidence in the justice system (80%) with confidence in the jury system (78%).⁶¹

The Supreme Court has long trumpeted the value of trial by jury as fundamental to the criminal justice system and the United States Constitution.⁶² In recent years, the Supreme Court has recognized the primacy of the jury as the fact-finder in capital cases, holding in *Ring v. Arizona* that a jury, not a judge, must make the determination of all facts contributing to the sentencing determination in a capital case, including the finding of aggravating and mitigating factors.⁶³ Overruling *Walton v. Arizona*,⁶⁴ the Court in *Ring* explained that the defendant's "right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it . . . [did not encompass] the factfinding necessary to put him to death."⁶⁵

In terms of procedural exceptionalism, the widespread belief in the jury system plays a significant role in the expression of the retributive impulse to demand the death penalty. By allowing one's peers, as opposed to the state, to determine a defendant's fate, there is a presumption of fairness in the judicial decision understood as a reflection of community values.⁶⁶ A jury decision to sentence a defendant to death (or to recommend a death sentence) thus carries significantly more weight than if such a decision were made by an elected official or a judge alone.

Also inherent in the concept of jury decision-making is the idea that the jury is a proxy or an agent for the common sense of an individual in the community.⁶⁷ An average citizen in favor of the death penalty is

⁶¹ AMERICAN BAR ASSOCIATION, *supra* note 58, at 6–7 (1999) (reporting the results of a survey regarding Americans' understanding of an attitudes toward the justice system).

⁶² See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power — to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge").

⁶³ 536 U.S. 584, 609 (2002).

⁶⁴ 497 U.S. 639 (1990).

⁶⁵ *Ring*, 536 U.S. at 609; see also *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) ("The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.").

⁶⁶ As indicated by Justice Stewart in *Gregg v. Georgia*, "[j]ury sentencing has been considered desirable in capital cases in order 'to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."'" 428 U.S. 153, 190 (1976) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968)) (citation omitted).

⁶⁷ The Supreme Court underscored the importance of the role of the jury in capital sentencing in its decision in *Woodson v. North Carolina*, a companion case to *Gregg v. Georgia*, in which the Court struck down mandatory death sentences. 428 U.S. 280, 305 (1976). The Court opined:

Still further evidence of the incompatibility of mandatory death penalties with contemporary values is provided by the results of jury sentencing under discretionary

likely to conceive, at least subconsciously, that it will be applied in a manner similar to how they themselves would apply it if on a jury. The presumption therefore, when a capital sentence is handed down, is that the defendant deserved it. The confidence in the process (through agency) allows an individual to satisfy his impulse for retribution without meaningful reflection.

In other words, because the decision is made by one's local peers who can, in theory, be relied upon, the individual has permission to indulge his retributive impulse. Note that this is not an explanation of why a particular juror or jury may vote in favor of a death sentence in a particular case, but instead a rationale for why American society may not move toward abolition of capital punishment without an intervening event.

B. THE WRIT OF HABEAS CORPUS

"The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

—Article I of the U.S. Constitution⁶⁸

"The Habeas Corpus secures every man here, alien or citizen, against everything which is not law, whatever shape it may assume."

—Thomas Jefferson⁶⁹

A second aspect of American procedural exceptionalism is the writ of habeas corpus.⁷⁰ Habeas corpus means literally "that you may have the body."⁷¹ A writ of habeas corpus is a judicial mandate to a prison

statutes. In *Witherspoon v. Illinois*, . . . the Court observed that 'one of the most important functions any jury can perform' in exercising its discretion to choose 'between life imprisonment and capital punishment' is 'to maintain a link between contemporary community values and the penal system.' Various studies indicate that even in first-degree murder cases juries with sentencing discretion do not impose the death penalty 'with any great frequency.' The actions of sentencing juries suggest that under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers.

Id. at 295-96 (citations omitted).

⁶⁸ U.S. CONST., art. I.

⁶⁹ Letter from Thomas Jefferson to A. H. Rowan (1798), in 10 THE WRITINGS OF THOMAS JEFFERSON, MEMORIAL EDITION 61 (Andrew A. Lipscomb & Albert Ellory Bergh eds., 1903).

⁷⁰ As with the right to trial by jury, the writ has a long tradition in English law, thought by some to precede the Magna Carta, but in any event, assuming its present functions since the sixteenth century. Rufus E. Foster, *The Suspension of the Writ of Habeas Corpus*, 3 VA. L. REG. 665, 665 (1918). The Habeas Corpus Act of 1679 was even hailed by the English as almost a second Magna Carta. *Id.* at 666.

⁷¹ The fundamental essence of the writ as part of the American legal system is evidenced by its place in Article I of the United States Constitution. See U.S. CONST. art. I.

official ordering that an inmate be brought to the court. The court then evaluates the petition in order to determine whether that person is imprisoned lawfully and whether the court must release the individual from custody.

Any person who objects to his own or another's detention or imprisonment may generally, in the first instance, file a habeas corpus petition with the court. In order for the writ to be granted, permitting a hearing before the court, the petition must demonstrate legal or factual error by the court ordering the detention or imprisonment. Persons serving prison sentences typically file the majority of habeas corpus petitions.⁷²

In death penalty cases, state death row inmates use the writ of habeas corpus to receive federal court hearings once their state court appeals have been exhausted.⁷³ Although restricted significantly by the Anti-terrorism and Effective Death Penalty Act of 1996, petitioners are still entitled to "one bite at the apple," meaning one habeas appeal in the federal court system, provided they have exhausted their state law claims and are not resting their claim on a new legal rule not raised on direct appeal.⁷⁴

In terms of public opinion, there are not many polls or studies as to how Americans view habeas corpus. It is fair to say that many Americans do not understand how the writ works or at the very least the basic legal framework surrounding the writ.⁷⁵ What Americans do understand is that most individuals sentenced to death spend many years on death row and have their cases heard on appeal numerous times. If anything, the American public outcry is often in favor of restricting the number of appeals (and thus the use of the habeas) in order to provide "justice" and "closure" to families of victims.⁷⁶

While the Supreme Court has adopted different approaches over time as to the scope of the writ⁷⁷ and further recognized Congress' ability to severely restrict the use of the writ, the Court has nonetheless stead-

⁷² The intricate statutory and common law framework of habeas corpus law is beyond the scope of this Article, as the presence of the writ and its affect on the attitudes toward death penalty appeals are more germane here.

⁷³ 28 U.S.C. § 2254 (2008).

⁷⁴ *See id.* § 2244(b).

⁷⁵ *See generally* AMERICAN BAR ASSOCIATION, *supra* note 58.

⁷⁶ Among death penalty cases decided between 1973 and 1995, it took an average of over ten years between death sentence and execution to uncover errors serious enough to reverse a death penalty conviction. JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995, at ii (2000), <http://www2.law.columbia.edu/instructionalservices/liebman/liebman1.pdf>.

⁷⁷ Because the habeas process delays the finality of a criminal case, the Supreme Court has on more than one occasion sought to limit the scope of the writ to ensure that the costs of the process do not exceed its manifest benefits. *See, e.g.,* *McCleskey v. Zant*, 499 U.S. 467 (1991) (raising barriers against successive and abusive habeas petitions, explaining that such petitions—and federal collateral litigation generally—increase the "heavy burden" that

fastly acknowledged the that “[t]he writ of habeas corpus is one of the centerpieces of our liberties.”⁷⁸ The Court has similarly stated that “[t]he writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action,”⁷⁹ and accordingly, must be “administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.”⁸⁰ Recently, the Supreme Court has held that the writ may not be suspended as to American citizens even if they are classified as enemy combatants in the war against terror.⁸¹

As with the jury system, the habeas review of cases validates the retributive impulse that justice is being served by execution. Having multiple levels of review for a single case over the course of many years (and even successive habeas petitions) creates the perception that death penalty cases are thoroughly and completely considered before an execution takes place.⁸² Thus, when a death row inmate is finally executed, the public perception that results from the long habeas process is that capital punishment is being administered fairly and without error.

Habeas can also often facilitate the expression of the retributive impulse by focusing on the family members of the victims. As the time between the death sentence and the scheduled execution becomes prolonged, families of victims become more outraged and draw public sympathy and support. This is particularly true in the case of delays resulting from last minute appeals which typically receive significant media attention.

C. THE SIXTH AMENDMENT RIGHT TO COUNSEL

“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”

—Sixth Amendment⁸³

“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in

“threatens the capacity of the system to resolve primary disputes” by exhausting “scarce judicial resources”).

⁷⁸ *McCleskey v. Zant*, 499 U.S. 467, 496 (1991).

⁷⁹ *Harris v. Nelson*, 394 U.S. 286, 290–91 (1969). The Court here emphasized the writ of habeas corpus as an important check on the manner in which state courts pay respect to federal constitutional rights.

⁸⁰ *Id.* at 291.

⁸¹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004).

⁸² Prior to the passage of the Antiterrorism and Effective Death Penalty Act in 1996, death row inmates could file successive habeas petitions without any statute of limitations restrictions. *See* 28 U.S.C. § 2244 (2008).

⁸³ U.S. CONST., amend. VI.

some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

—Justice Hugo Black⁸⁴

In addition to the right to a jury trial and the right to petition for habeas corpus, criminal defendants are accorded the right to have legal representation. As with jury trials and habeas corpus, the right to an attorney is a vestige of English common law.⁸⁵ During the twentieth century, however, it has taken on a broader meaning in the United States, as it has been applied to all criminal cases, not just felonies.⁸⁶ In addition, the Sixth Amendment requires not only that the accused receive representation, but also that the representation be adequate.⁸⁷

In the death penalty context, the right to have adequate representation becomes a matter of even greater importance. Serving in theory to ensure that an innocent individual is not executed as a result of incompetent representation, the legal doctrine of ineffective assistance of counsel serves as a basis to grant a new trial to an individual sentenced to death.⁸⁸

As with the right to a jury trial, the United States Supreme Court has championed the right to effective assistance of counsel. In *Gideon v. Wainwright*, the Court recognized the essential nature of representation by counsel:

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments,

⁸⁴ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

⁸⁵ See W. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 8–26 (1955).

⁸⁶ *Id.*

⁸⁷ See *Faretta v. California*, 422 U.S. 806 (1975) ("The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.").

⁸⁸ See *Strickland v. Washington*, 466 U.S. 688, 694 (1984) (articulating the standard for ineffective assistance of counsel and stating that "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.⁸⁹

The Court thus believes that "a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding," where the "right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled."⁹⁰

The right to effective counsel, then, is another procedural tool by which the accused should receive a fair trial. The presumed fairness of the trial procedure, derived from the presence of a staunch legal advocate for the accused, leads to the assumption that guilty verdicts are likely to be reliable. This is true because the adversarial process creates the appearance that the decision as to guilt or innocence was made in light of a fair presentation of the accused's perception of the events surrounding the crime at issue.

The effective assistance of counsel gives a similar credibility to the decision to sentence a convicted defendant to death. Because the defendant is afforded representation to argue for his life, there is a strong presumption that such arguments are rejected only when the argument for life is not persuasive in light of the facts and circumstances.

Put bluntly, the presumption that a death sentence carries is that the defendant deserves to die. Given these presumptions, it is not a stretch to view the right to effective counsel as a facilitator for the expression of the impulse toward retribution.

⁸⁹ 372 U.S. 335, 344 (citations omitted).

⁹⁰ *Strickland*, 466 U.S. at 685 (citation omitted); see also *Powell v. Alabama*, 287 U.S. 45 (1932).

III. RELATIONSHIP BETWEEN CONFIDENCE IN THE PROCESS OF RETENTION AND ADMINISTRATION OF CAPITAL PUNISHMENT IN AMERICA

As the history of the last thirty years indicates, the connection between American procedural exceptionalism and the retention and administration of the death penalty has not occurred in a vacuum. To the contrary, the perceived efficacy of the American judicial process—and the belief that any shortcomings can be adequately addressed by repairing procedural flaws—has shaped the ebb and flow between retention and abolition.

Interestingly, public opinion regarding the use of the death penalty has coincided directly with corresponding public confidence in the procedural framework discussed herein. For instance, the broader trends in public opinion polls concerning the death penalty roughly mirror the trends both in the number of individuals sentenced to death in a given year and the number of individuals executed in a given year.⁹¹

In the administration of the death penalty, however, the confidence of the general public in the process does not dictate particular outcomes. Instead, one must look closely at the relative confidence of each of the decisionmakers in the criminal justice system in order to explain the frequency of death penalty convictions and executions. These decisionmakers include state legislatures, state governors, state trial court judges and juries, and the United States Supreme Court.

A. THE UNITED STATES SUPREME COURT

Clearly the most powerful of the relevant decisionmakers, the United States Supreme Court remains in the best position of any institution to abolish the death penalty wholesale. As a brief examination of the Court's cases dating from *Furman* to the present shows, the Court's body of decisions can be understood as its subscription to the procedural exceptionalism of the criminal justice system.⁹²

As members of the Court exhibit increasing levels of confidence in the fair administration of the death penalty (based in large part on the fundamental procedural elements cited above), the Court tends to rule in a manner to expand or broaden its use. On the other hand, where evidence presented to the Court raises doubts about the efficacy of the trial process, the Court moves to restrict the use of the death penalty. As

⁹¹ See Gallup.com, *supra* note 46 (providing a comparison of death penalty polls taken in the United States since 1936).

⁹² For a thorough examination of the Supreme Court's death penalty jurisprudence dating from *Furman*, see James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1 (2007).

indicated below, the Court's doubts about procedure in *Furman* resulted in a moratorium on administration of the death penalty.

1. *McGautha v. California*

In *McGautha v. California*, a 6–3 majority of the Supreme Court reaffirmed the Court's traditional faith in the reliability of jury decisions, rejecting the petitioners' claim that the state jury procedures in their respective capital cases violated the procedural due process requirements of the Fourteenth Amendment to the United States Constitution.⁹³ The Court held that the Constitution did not require any restriction of the discretion of juries in capital trials or the bifurcation of such trials into guilt and punishment phases.⁹⁴ Acknowledging its belief in the jury system, the Court explained that "[i]n light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."⁹⁵

Despite the outcome in *McGautha*, the opinions of the dissenting Justices expressed serious apprehension about the state sentencing procedures, given their absence of any limitation on jury discretion and their combination of guilt and punishment determinations into a single trial deliberation.⁹⁶ Justice William J. Brennan's concern with the open-ended jury discretion in the state sentencing schemes at issue in *McGautha* was that they were inadequate because they were not "designed to control arbitrary action and also to make meaningful the otherwise available mechanism for judicial review."⁹⁷

⁹³ 402 U.S. 183, 196 (1971).

⁹⁴ See *id.* at 207, 221. The Court rejected the argument that a unitary trial violated the Constitution by forcing a defendant to decide whether to "remain silent on the issue of guilt only at the cost of surrendering any chance to plead his case on the issue of punishment." *Id.* at 211, 213.

⁹⁵ *Id.* at 207.

⁹⁶ See *id.* at 248, 309 (Brennan, J. dissenting, joined by Marshall, J. & Douglas, J.) ("The question that petitioners present for our decision is whether the rule of law, basic to our society and binding upon the States by virtue of the Due Process Clause of the Fourteenth Amendment, is fundamentally inconsistent with capital sentencing procedures that are purposely constructed to allow the maximum possible variation from one case to the next, and provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice."). See also John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, in *THE EVOLUTION OF A JUDICIAL PHILOSOPHY* 289, 291–92 (David L. Shapiro ed., 1969) ("Our scheme of ordered liberty is based, like the common law, on enlightened and uniformly applied legal principle, not on ad hoc notions of what is right or wrong in a particular case.").

⁹⁷ *McGautha*, 402 U.S. at 268 (Brennan, J., dissenting). Brennan is not questioning the role of the jury here as the arbiter of the decision concerning life and death; rather, he is simply arguing for greater guidance from the state in the decisionmaking process and for greater ability to review the rationales underlying the jury's verdict. *Id.* at 311 ("Finally, I should add

As to the concept of a unitary trial, Justice William Douglas wrote:

The unitary trial is certainly not “mercy” oriented. That is, however, not its defect. It has a constitutional infirmity because it is not neutral on the awesome issue of capital punishment. The rules are stacked in favor of death. It is one thing if the legislature decides that the death penalty attaches to defined crimes. It is quite another to leave to judge or jury the discretion to sentence an accused to death or to show mercy under procedures that make the trial death oriented. Then the law becomes a mere pretense, lacking the procedural integrity that would likely result in a fair resolution of the issues. In Ohio, the deficiency in the procedure is compounded by the unreviewability of the failure to grant mercy.⁹⁸

Thus, for both the majority and the dissenters, their respective views of the fairness of the jury procedure, and not their overall view concerning the propriety of the death sentences in the cases before them, dictated their respective opinions in this case. The concern in *McGautha* with the administration of the death penalty was thus purely procedural.

2. *Furman v. Georgia*

In 1972, the United States Supreme Court decided *Furman v. Georgia*, holding that the death penalty, as applied, violated the cruel and unusual punishment clause of the Eighth Amendment.⁹⁹ Although initially understood by many to signal the abolition of capital punishment in the United States, a plurality of the Justices in *Furman* instead focused on the deficiencies in process, particularly with respect to the sentencing guidance provided to the jury.¹⁰⁰ Specifically, several on the Court took issue with the broad discretion given to a jury,¹⁰¹ both regarding the

that for several reasons the present cases do not draw into question the power of the States that should so desire to commit their criminal sentencing powers to a jury. For one thing, I see no reason to believe that juries are not capable of explaining, in simple but possibly perceptive terms, what facts they have found and what reasons they have considered sufficient to take a human life. Second, I have already indicated why I believe that life itself is an interest of such transcendent importance that a decision to take a life may require procedural regularity far beyond a decision simply to set a sentence at one or another term of years.”)

⁹⁸ *Id.* at 247 (Douglas, J., dissenting).

⁹⁹ 408 U.S. 238, 239–40 (1972) (plurality opinion).

¹⁰⁰ *See, e.g., id.* at 295 (Brennan, J., concurring).

¹⁰¹ *See id.* At the time of *Furman*, juries typically heard only evidence concerning whether the defendant committed the capital crime at issue. Without any instruction as to sentencing, the judge would then instruct the jury to make two determinations. First, the jury was to determine whether the defendant was guilty of the capital crime alleged and second, whether the verdict of guilt was issued “with mercy” (no death sentence) or “without mercy.” *See, e.g.,* FLA. STAT. § 921.141 (1970) (amended 1972) (“A defendant found guilty by a jury

range of a potential sentence and the lack of guidance as to when a death sentence was proper, as well as the absence of bifurcation between the guilt and sentencing phases of trial.¹⁰²

As Justice Stewart concluded, the death penalty *as applied* constituted cruel and unusual punishment because the operative system allowed the death penalty to be “so wantonly and so freakishly imposed.”¹⁰³ Thus, this demonstration of a severe flaw in the American procedural model, specifically jury decisionmaking, resulted in the suspension of capital punishment in the United States for several years, with no executions occurring for almost a decade.¹⁰⁴

3. *Gregg v. Georgia*

Immediately following the *Furman* decision, state legislatures across the United States rewrote their death penalty statutes to comply with the *Furman* ruling.¹⁰⁵ As detailed in *Gregg v. Georgia*, some legis-

of an offense punishable by death shall be sentenced to death unless the verdict includes a recommendation to mercy by a majority of the jury.”).

¹⁰² See *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *cf. id.* at 253–57 (Douglas, J., concurring). Later, in *Woodson v. North Carolina*, the Court cited “*Furman*’s rejection of unbridled jury discretion in the imposition of capital sentences,” explaining that “[c]entral to the limited holding in *Furman* was the conviction that the vesting of standardless sentencing power in the jury violated the Eighth and Fourteenth Amendments.” 428 U.S. 280, 302 (1976).

¹⁰³ *Furman*, 238 U.S. at 310. Justice Stewart explained:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed. *Id.* at 309–10 (footnotes omitted).

¹⁰⁴ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Key Facts at a Glance: Executions*, <http://www.ojp.usdoj.gov/bjs/glance/tables/exetab.htm> (last visited Feb. 19, 2008). The Court has acknowledged the importance of procedural reliability in the determination of a death sentence. See *Woodson*, 428 U.S. at 305 (“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”) (opinion of Stewart, J.).

¹⁰⁵ See *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976) (noting that “[t]he legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person” and citing the following statutes: Ala. H.B. 212, §§ 2-4, 6-7 (1975); Ariz. Rev. Stat. Ann. §§ 13-452 to 13-454 (Supp. 1973); Ark. Stat. Ann. § 41-4706 (Supp. 1975); Cal. Penal Code §§ 190.1, 209, 219 (Supp. 1976); Colo. Laws 1974, c. 52, § 4; Conn. Gen. Stat. Rev. §§ 53a-25, 53a-35(b), 53a-46a, 53a-54b (1975); Del. Code Ann. tit. 11, § 4209 (Supp. 1975); Fla. Stat. Ann. §§ 782.04, 921.141 (Supp. 1975-1976); Ga. Code Ann. §§ 26-3102, 27-2528, 27-2534.1, 27-2537 (Supp. 1975); Idaho Code § 18-4004 (Supp. 1975); Ill. Ann. Stat. c. 38, §§ 9-1, 1005-5-3, 1005-8-1A (Supp. 1976-1977);

latures bifurcated the guilt and sentencing phases of trial, added a series of aggravating and mitigating circumstances to guide juries in their determination of whether a particular crime warranted capital punishment, and mandated immediate appellate review of death sentences, including an evaluation of the proportionality of the sentence.¹⁰⁶

In *Gregg*, the Supreme Court held that the new Georgia statute cured the procedural defects identified in *Furman*, and as a result, did not violate the cruel and unusual punishment clause of the Eighth Amendment.¹⁰⁷ The Court emphasized that the revised statutory scheme narrowed the class of convicted murderers who could receive the death penalty, and, in providing for consideration of aggravating and mitigating circumstances, further channeled the discretion of the jury in sentencing.¹⁰⁸

Again, as in *Furman*, the Supreme Court's belief in the efficacy of the American criminal justice system—specifically the decisionmaking of the jury at sentencing—dictated the Court's comfort level with permitting the use of the death penalty as well as its concurrent expression of the underlying retributive impulse. Quoting from previous Supreme Court decisions, the authors of the main opinion explained, "When people begin to believe that organized society is unwilling or unable to impose upon offenders the punishment that they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch

Ind. Stat. Ann. § 35-13-4-1 (1975); Ky. Rev. Stat. Ann. § 507.020 (1975); La. Rev. Stat. Ann. § 14:30 (Supp. 1976); Md. Ann. Code, art. 27, § 413 (Supp. 1975); Miss. Code Ann. §§ 97-3-19, 97-3-21, 97-25-55, 99-17-20 (Supp. 1975); Mo. Ann. Stat. § 559.009, 559.005 (Supp. 1976); Mont. Rev. Codes Ann. § 94-5-105 (Spec. Crim. Code Supp. 1976); Neb. Rev. Stat. §§ 28-401, 29-2521 to 29-2523 (1975); Nev. Rev. Stat. § 200.030 (1973); N.H. Rev. Stat. Ann. § 630:1 (1974); N.M. Stat. Ann. § 40A-29-2 (Supp. 1975); N.Y. Penal Law § 60.06 (1975); N.C. Gen. Stat. § 14-17 (Supp. 1975); Ohio Rev. Code Ann. §§ 2929.02-2929.04 (1975); Okla. Stat. Ann. tit. 21, § 701.1-701.3 (Supp. 1975-1976); Pa. Laws 1974, Act No. 46; R.I. Gen. Laws Ann. § 11-23-2 (Supp. 1975); S.C. Code Ann. § 16-52 (Supp. 1975); Tenn. Code Ann. §§ 39-2402, 39-2406 (1975); Tex. Penal Code Ann. § 19.03(a) (1974); Utah Code Ann. §§ 76-3-206, 76-3-207, 76-5-202 (Supp. 1975); Va. Code Ann. §§ 18.2-10, 18.2-31 (1976); Wash. Rev. Code §§ 9A.32.045, 9A.32.046 (Supp. 1975); Wyo. Stat. Ann. § 6-54 (Supp. 1975)). For an extensive discussion of the mandatory sentencing statutes passed in response to *Furman*, see John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 200-26 (1986).

¹⁰⁶ See 428 U.S. at 162-68 (1976); see also *Jurek v. Texas*, 428 U.S. 262, 268, 269, 276 (1976), *Proffitt v. Florida*, 428 U.S. 242, 247-51, 259 (1976) (upholding the constitutionality of state capital punishment statutes and stating that the death penalty is not *per se* unconstitutional under the cruel and unusual punishment clause of the Eighth Amendment). But cf. *Roberts v. Louisiana*, 428 U.S. 325, 335-36 (1976) (invalidating Louisiana's mandatory death sentence statute for its failure to provide juries with standards in imposing the death sentence and for its lack of proper appellate review of a jury's decision).

¹⁰⁷ See *Gregg*, 428 U.S. at 206-07.

¹⁰⁸ See *id.* at 103-04.

law.’”¹⁰⁹ The Court continued, “‘Retribution is no longer the dominant objective of the criminal law, but neither is it . . . inconsistent with our respect for the dignity of men.’”¹¹⁰

4. *Woodson v. North Carolina*

Around the same time as *Gregg*, in *Woodson v. North Carolina*, the Supreme Court considered a second set of state statutes written in response to *Furman*’s mandate.¹¹¹ These statutes eliminated jury discretion entirely in some instances, making a death sentence mandatory for certain crimes.¹¹²

Reaffirming its view of the jury’s necessity in capital trials, the Supreme Court struck down the mandatory death sentence statutes as unconstitutional under the Eighth Amendment.¹¹³ The Court cited evidence that “juries operating under discretionary sentencing statutes have consistently returned death sentences in only a minority of first-degree murder cases.”¹¹⁴ It thus concluded that “it is only reasonable to assume that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict.”¹¹⁵ Thus, the mandatory death penalty statute was unconstitutional precisely because it “provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die.”¹¹⁶

Again, the Court’s actions track the concept of procedural exceptionalism. Where, as here, a state’s statutory scheme compromises a fundamental procedural concept—here the role of the jury—the Court insists on restoring that safeguard and blocks the expression of the retributive impulse by reversing the defendant’s death sentence. As with *McGautha*, *Furman*, and *Gregg*, the Court decides the outcome of the case in *Woodson* on purely procedural grounds, irrespective of the substantive components of the underlying conviction and death sentence.

¹⁰⁹ *Id.* at 183 (quoting *Furman v. Georgia*, 408 U.S. 238, 308 (1972)).

¹¹⁰ *Id.* (quoting *Williams v. New York*, 337 U.S. 241, 248 (1949)).

¹¹¹ 428 U.S. 280, 286–87 (1976); see also *Roberts*, 428 U.S. at 335–36 (declaring a similar mandatory death sentence scheme unconstitutional).

¹¹² See *Woodson*, 428 U.S. at 286–87.

¹¹³ See *id.* at 302, 305.

¹¹⁴ *Id.* at 303; see also *Furman*, 408 U.S. at 386–87 n.11 (Burger, C. J., dissenting) (stating that data compiled on discretionary jury sentencing of persons convicted of capital murder have shown that the penalty of death is generally imposed in less than 20% of the cases).

¹¹⁵ *Woodson*, 428 U.S. at 303.

¹¹⁶ *Id.* (“Instead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in *Furman* by resting the penalty determination on the particular jury’s willingness to act lawlessly.”).

5. *The Post-Furman Era*

The Court's post-*Furman* opinions expanding and contracting the use of the death penalty coincided with the shifting views of the majority regarding the procedural fairness of the administration of the death penalty. The Court restricted the death penalty and heightened the requirements for capital procedures several times, holding (1) the jury must be allowed to consider as a mitigating factor "any aspect of the defendant's character or record, and any of the circumstances of the offense that the defendant proffers as a basis for a sentence other than death";¹¹⁷ (2) a prosecutor cannot be permitted to argue that any error by the jury will be corrected by higher courts on appeal, since it gives the jury a diminished sense of responsibility with regard to its decision;¹¹⁸ (3) it is unconstitutional to execute the insane;¹¹⁹ (4) a prosecutor cannot use peremptory challenges to exclude black jurors on the basis of race when the defendant is black;¹²⁰ and (5) a death sentence may not be imposed on a person following conviction of a murder committed when they were 15 years old.¹²¹

Conversely, the Court affirmed the use of the death penalty where specific patterns of racial discrimination could not be demonstrated despite statistical evidence purporting to general patterns of racial discrimination through sharp sentencing disparities.¹²² It also affirmed a state death penalty regime which compelled a death sentence in cases with an aggravating circumstance and no mitigating circumstance, or where the aggravating circumstances outweighed any mitigating ones.¹²³

Perhaps the best example in recent years of the connection between the Court's jurisprudence and its belief in the importance of procedure are its recent prohibitions in the use of the death penalty for minor¹²⁴ (at the time the crime was committed) and mentally retarded¹²⁵ defendants, reversing cases from less than twenty years before.¹²⁶ The concern with

¹¹⁷ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

¹¹⁸ *Caldwell v. Mississippi*, 472 U.S. 320, 330–33, 341 (1985).

¹¹⁹ *Ford v. Wainwright*, 477 U.S. 399, 417–18 (1986).

¹²⁰ *Batson v. Kentucky*, 476 U.S. 79, 96–98 (1986).

¹²¹ *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988).

¹²² *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987).

¹²³ *Blaystone v. Pennsylvania*, 494 U.S. 299, 309 (1990).

¹²⁴ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

¹²⁵ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

¹²⁶ See *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (holding that execution of mentally retarded defendants does not violate the "cruel and unusual" punishment clause of the Eighth Amendment), *overruled by Atkins v. Virginia*, 536 U.S. 304 (2002); *Stanford v. Kentucky* 492 U.S. 361, 380 (1989) (holding that execution of sixteen year olds who commit murder does not violate the "cruel and unusual" punishment clause of the Eighth Amendment), *overruled by Roper v. Simmons*, 543 U.S. 551 (2005). Interestingly, Kentucky Governor Paul Patton commuted the death sentence of Kevin L. Stanford in 2003. Valarie Honeycutt Spears, *Patton Commutes Killer's Sentence*, LEXINGTON HERALD-LEADER, June 19, 2003, at B1.

fairness of process—the conscience which permits the expression of the retributive impulse—again served as an important basis for these decisions.

In *Atkins v. Virginia*, the Court held that execution of mentally retarded defendants constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution.¹²⁷ The Court's reasoning relied in part on the determination that "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution."¹²⁸ The Court explained:

The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.¹²⁹

Similarly, in *Roper v. Simmons*, the Supreme Court declared the execution of individuals for crimes committed before the age of eighteen unconstitutional under the Eighth Amendment.¹³⁰ Again, the Court concluded that executing juveniles rose to the level of an Eighth Amendment violation in part because of questions in the fairness of the process, specifically that a juvenile's diminished capacity may not be weighed properly as a mitigating factor.¹³¹ As the Court explained, "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."¹³²

Finally, in the recently decided case of *Baze v. Rees*, the Court continued its focus on procedure in death penalty cases.¹³³ The petitioners in *Baze* challenged the constitutionality of Kentucky's lethal injection procedure under the Eighth Amendment, proffering a theory that the procedures subjected them "to a risk of future harm," that qualified as cruel

¹²⁷ 536 U.S. at 321.

¹²⁸ *Id.*

¹²⁹ *Id.* at 320–21 (citations omitted).

¹³⁰ See *Roper*, 543 U.S. at 555–56.

¹³¹ *Id.* at 573.

¹³² *Id.*

¹³³ *Baze v. Rees*, 128 S. Ct. 1520 (2008) (plurality opinion).

and unusual punishment.¹³⁴ Specifically, petitioners claimed “that there is a significant risk that [Kentucky’s lethal injection] procedures will *not* be properly followed—in particular, that the sodium thiopental will not be properly administered to achieve its intended effect—resulting in severe pain when the other chemicals are administered.”¹³⁵

The Court held 7–2 that the Kentucky lethal injection procedure did not violate the Eighth Amendment, but the basis for the holding varied widely among the Justices. The plurality of Justices John Roberts, Samuel Alito, and Anthony Kennedy applied a “substantial risk” standard that accorded significant deference to state legislatures in devising execution methods. They explained that “to prevail on such a claim there must be a ‘substantial risk of serious harm,’ an ‘objectively intolerable risk of harm’ that prevents prison officials from pleading that they were ‘subjectively blameless for purposes of the Eighth Amendment.’”¹³⁶ Further, under this standard, “a condemned prisoner cannot successfully challenge a State’s method of execution merely by showing a slightly or marginally safer alternative.”¹³⁷ Finding that the Kentucky lethal injection procedure did not impose a “substantial risk,” the plurality upheld the procedure.

Justices Antonin Scalia and Clarence Thomas applied an even less restrictive standard, finding that an execution procedure does violate the Eighth Amendment “only if it is deliberately designed to inflict pain.”¹³⁸ Because “Kentucky adopted its lethal injection protocol in an effort to make capital punishment more humane, not to add elements of terror, pain, or disgrace to the death penalty,” Thomas and Scalia found that it did not violate the Eighth Amendment.¹³⁹

Justices Ruth Bader Ginsburg and David Souter, in dissent, adopted the most restrictive standard, requiring intermediate scrutiny of the Kentucky lethal injection procedure.¹⁴⁰ Unlike the plurality, they found that the concepts of the degree of risk, magnitude of pain, and availability of alternatives are “interrelated; a strong showing on one reduces the importance of the others.”¹⁴¹ Thus, the failure to demonstrate a substantial risk in the individual case did not preclude consideration of the question of whether “Kentucky’s protocol, creates an untoward, readily avoidable risk of inflicting severe and unnecessary pain.”¹⁴²

¹³⁴ *Id.* at 1530–31.

¹³⁵ *Id.* at 1530.

¹³⁶ *Id.* at 1531 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846, 847 n.9 (1994)).

¹³⁷ *Id.*

¹³⁸ *Id.* at 1556 (Thomas, J., concurring).

¹³⁹ *Id.* at 1563 (Thomas, J., concurring).

¹⁴⁰ *Id.* at 1567 (Ginsburg, J., dissenting).

¹⁴¹ *Id.* at 1568 (Ginsburg, J., dissenting).

¹⁴² *Id.* at 1572 (Ginsburg, J., dissenting).

Justice Stephen Breyer likewise adopted this standard.¹⁴³ He concurred with the plurality's outcome, however, because under the facts and circumstances presented, he did not find that Kentucky's lethal injection procedure created an untoward, readily avoidable risk of inflicting severe and unnecessary pain.¹⁴⁴

Again, the Court's focus here was on the proper procedure by which an execution could be carried out, and the corresponding level of scrutiny that the state protocol should be accorded, and not on reopening the questions addressed by *Gregg*.¹⁴⁵ Only Justice John Paul Stevens, in aligning himself with Justice Byron White's opinion in *Furman*, moves from the procedural question to the underlying substantive one in raising doubt as to the appropriateness of using the death penalty at all. Stevens concluded:

In sum, just as Justice White ultimately based his conclusion in *Furman* on his extensive exposure to countless cases for which death is the authorized penalty, I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment."¹⁴⁶

Given the Court's ongoing concern with the procedure in death penalty cases, what effect will procedural exceptionalism ultimately have on the Court's jurisprudence? Justice Harry Blackmun, who dissented in *Furman* and sided with the majority in *Gregg*, concluded that the Court has been unable to achieve a workable procedural framework in capital cases. In his dissenting opinion to the denial of certiorari in *Callins v. Collins*, Blackmun wrote:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor.¹⁴⁷

¹⁴³ *Id.* at 1563 (Breyer, J., concurring).

¹⁴⁴ *Id.* at 1563–64 (Breyer, J., concurring).

¹⁴⁵ *Id.* at 1529 (plurality opinion) ("We begin with the principle, settled by *Gregg*, that capital punishment is constitutional.").

¹⁴⁶ *Id.* at 1551 (Stevens, J., concurring) (quoting *Furman*, 408 U.S. at 312 (White, J., concurring)).

¹⁴⁷ 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

Subsequently, two sitting Supreme Court Justices publicly questioned the fairness of the death penalty trial and appeal process, particularly in light of the tendency for defendants to have inadequate counsel at trial. Justice Sandra Day O'Connor stated:

If statistics are any indication, the system may well be allowing some innocent defendants to be executed Serious questions are being raised about whether the death penalty is being fairly administered in this country. Perhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used.¹⁴⁸

Similarly, Justice Ginsburg has questioned the fairness of the trial process, stating:

I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial People who are well represented at trial do not get the death penalty.¹⁴⁹

The doubts of Justices O'Connor and Ginsburg about the efficacy and fairness of the process do not signal, however, a path ending in abolition. Such sentiments, to the extent that they are shared by a majority on the Court, simply indicate that the procedures in capital cases may yet again be examined and circumscribed.

B. STATE LEGISLATURES

In the twentieth century, state legislatures have consistently taken the approach that state criminal justice systems have the ability to oversee the fair and just use of capital punishment.¹⁵⁰ By utilizing the traditional safeguards of the jury system, the writ of habeas corpus, and the right to legal representation, state legislatures in death penalty jurisdictions have repeatedly adapted to comply with Supreme Court decisions by creating new structures that enable them to use capital punishment to the greatest possible extent.

After *Furman*, for instance, virtually all of the states with death penalty statutes (all of which were declared unconstitutional) rushed to pass

¹⁴⁸ The Justice Project, *The Problem: A Broken System*, <http://www.thejusticeproject.org/national/problem> (last visited Aug. 18, 2008) (quoting Sandra Day O'Connor, Address to Minnesota Women Lawyers Group (July 2, 2001)).

¹⁴⁹ *Ginsburg Backs Ending Death Penalty*, ASSOCIATED PRESS (Apr. 9, 2001), available at <http://www.truthinjustice.org/ginsburg.htm>.

¹⁵⁰ The decision of almost every state legislature to pass a new capital punishment statute after *Furman* epitomizes this attitude. See *supra* note 103 and accompanying text.

new statutes complying with *Furman*.¹⁵¹ For those, such as North Carolina, whose amended statute still did not pass constitutional muster, another new statute was passed to ensure the continued availability of the death penalty.¹⁵² Similarly, Ohio passed an amended death penalty statute after the Supreme Court declared its statute unconstitutional for failing to provide defendant's an adequate opportunity to offer evidence of mitigation at sentencing.¹⁵³

Such legislative response can be understood simply as a commitment to the death penalty as a punishment, or further as a reflection of the broader political will of the people, even though support for the death penalty was at an all-time low.¹⁵⁴ However, underlying either approach must be a belief that a new death penalty scheme could be devised to allow the death penalty to be administered in a fair and just manner, consistent with the Constitution. Even in states which had long abolished capital punishment, the state legislature has tried to reintroduce capital punishment when procedural confidence in the system is high.¹⁵⁵

C. GOVERNORS

Governors likewise use their power to enlarge or restrict the use of the death penalty consistent with their view, or that of their constituency, of the process. When confidence in the fairness of the death penalty has been high, governors have used the death penalty for political gain. For instance, George Pataki made reinstatement of the death penalty a centerpiece of his campaign for Governor of New York, and he reinstated it upon election in 1995.¹⁵⁶ Similarly, then-Arkansas Governor Bill Clinton interrupted his 1992 presidential campaign to oversee the execution of Ricky Ray Rector.¹⁵⁷

Conversely, when confidence in the capital punishment system wanes, governors have imposed restrictions on the availability of the death penalty. For instance, George Ryan, then-governor of Illinois, declared a moratorium on capital punishment in Illinois in January, 2000, pending an investigation into the state's death penalty system.¹⁵⁸ Ryan

¹⁵¹ See *supra* note 105.

¹⁵² See *Woodson v. North Carolina*, 428 U.S. 280 (1976).

¹⁵³ See OHIO REV. CODE ANN. §§ 2929.02-06 (West 1982); *Lockett v. Ohio*, 438 U.S. 586 (1978).

¹⁵⁴ See Gallup.com, *supra* note 46.

¹⁵⁵ In 1999, bills were brought forward to reintroduce the death penalty in Iowa, Maine, Massachusetts, Minnesota, and Michigan. See HOOD, *supra* note 5.

¹⁵⁶ James Dao, *February 12-18: Capital Punishment; New York Prepares for a New Death Penalty*, N.Y. TIMES, Feb. 19, 1995, at 2.

¹⁵⁷ Peter Applebome, *The 1992 Campaign: Death Penalty; Arkansas Execution Raises Questions on Governor's Politics*, N.Y. TIMES, Jan. 25, 1992, at Sec. 1, 18.

¹⁵⁸ At the time that Ryan ordered the examination of the state death penalty system, new studies had suggested that innocent defendants had been executed. See LIEBMAN ET AL., *supra*

stated, “We have now freed more people than we have put to death under our system—13 people have been exonerated and 12 have been put to death There is a flaw in the system, without question, and it needs to be studied.”¹⁵⁹ Three years later, Ryan declared a permanent moratorium on the death penalty in Illinois because his study had “found only more questions about the fairness of sentencing” and that the administration of the death penalty was “arbitrary and capricious.”¹⁶⁰

In 2006 and 2007, prior to the Supreme Court’s decision in *Baze*, several governors declared temporary moratoria on the death penalty because of questions surrounding the lethal injection procedure.¹⁶¹ Executions were temporarily suspended in eleven states—Arkansas, California, Delaware, Florida, Louisiana, Maryland, Missouri, North Carolina, Ohio, South Dakota, and Tennessee—as a result of pending court rulings on challenges against lethal injection or reviews of the lethal injection process by state governors.¹⁶² No state, however, has declared a permanent moratorium. Even if the Court had declared lethal injection unconstitutional, there was no indication that the state governors would not have wholeheartedly supported all attempts to remedy a constitutional defect in order to continue the use of capital punishment. Again, procedural exceptionalism dictates pursuit of a means to express the retributive impulse.

IV. AMERICAN PROCEDURAL EXCEPTIONALISM: DETERRENT OR ABOLITION OF THE DEATH PENALTY IN THE UNITED STATES?

If one subscribes to the existence of American procedural exceptionalism, what does the future of the death penalty in the United States hold? Does procedural exceptionalism serve as a catalyst for the aboli-

note 76, at i (“Capital trials produce so many mistakes that it takes three judicial inspections to catch them—leaving grave doubt whether we *do* catch them all. After state courts threw out 47% of death sentences due to serious flaws, a later federal review found ‘serious error’—error undermining the reliability of the outcome—in 40% of the remaining sentences” (emphasis in the original)).

¹⁵⁹ *Illinois Suspends Death Penalty*, CNN.com, Jan. 31, 2000, <http://archives.cnn.com/2000/US/01/31/illinois.executions.02>.

¹⁶⁰ George Ryan, *I Must Act*, Speech to Northwestern University College of Law, Jan. 11, 2003 (announcing the commutation of all death sentences in Illinois). In May 2002, Maryland Governor Parris Glendening similarly declared a moratorium on the death penalty in Maryland. See Francis X. Clines, *Death Penalty is Suspended in Maryland*, N.Y. TIMES, May 10, 2002, at A20.

¹⁶¹ See Death Penalty Information Center, *Lethal Injection: Moratorium on Executions Ends After Supreme Court Decision*, <http://www.deathpenaltyinfo.org/article.php?did=1686> (last visited Aug. 18, 2008) (documenting actions by various governors in light of the lethal injection controversy).

¹⁶² Kavan Peterson, *Death Penalty: Lethal Injection on Trial*, <http://www.stateline.org/live/details/story?contentId=171776> (Jan. 17, 2007).

tion of the death penalty, as it appeared to with the *Furman* decision, or will it ultimately serve as a deterrent to abolition, as happened in *Gregg*?

Justice Blackmun concluded that the Court could not develop a system by which capital punishment could be fairly and justly administered:

The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.¹⁶³

While other Justices have expressed doubts about the administration of capital punishment in certain situations,¹⁶⁴ there is no Justice currently on the Court who wholeheartedly agrees with Blackmun's sentiment that the "machinery of death" cannot continue to be tinkered with to minimize and even eliminate injustice.¹⁶⁵

When a majority of the Justices have the view that the administration of capital punishment has procedural flaws, it is likely that the Court will move, as it has done recently, to restrict the use of capital punishment. However, the likelihood of five Justices concluding that no process can ensure the fair administration of capital punishment appears, for the time being, remote.

Similarly, as the recent moratoria in a number of states related to the lethal injection procedure indicates, Governors and other decisionmakers will move to limit or temporarily halt executions when the efficacy of the procedure is in doubt. Again, though, such authorities were not using the lethal injection problems as a basis for abolishing capital punishment; rather, they are merely halting the process in light of the doubts cast upon the propriety of the protocol in place.

Jurors likewise appear unlikely to cease recommending the death penalty. Reports of innocent defendants being put to death may influence juries to hesitate before recommending a death sentence, which could result in fewer death sentences, but regardless of the political climate, one must strain to imagine all juries *de facto* deciding not to recommend the death penalty.

Although in many ways the waning of procedural exceptionalism has the potential to restrict and limit the use of capital punishment in the United States, it will at the same time ultimately inhibit the complete abolition of the death penalty in the United States.

¹⁶³ *Callins v. Collins*, 510 U.S. 1141, 1145 (1994).

¹⁶⁴ See *supra* notes 146–47.

¹⁶⁵ *Callins*, 510 U.S. at 1145. Justice Stevens is clearly moving in this direction based on his concurrence in *Baze*, but he still sided with the majority in the outcome on stare decisis grounds. *Baze v. Rees*, 128 S. Ct. 1520, 1552 (2008) (Stevens, J., concurring).

CONCLUSION

Thus, as has been shown, the American belief in its system of legal process ironically serves as the key factor that facilitates the persistence of the death penalty in the United States. As one can see from the history of political and judicial activity over the last thirty years, shifts toward or away from abolition of capital punishment rest not in shifts of normative views of the death penalty but instead on the relative confidence of decisionmakers that the criminal justice system administers the death penalty in a fair, just, and non-arbitrary manner. Ultimately, however, it is the belief in procedure that will more likely than not prevent the complete abolition of capital punishment for the foreseeable future in the United States.

